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82-1661

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1982

M. T. WARD, *Petitioner,*

v.

FAY FOWLER WARD

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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April, 1983

QUESTIONS PRESENTED

1. Whether Okla. Stat. Tit. 12 § 1278 and its interpretation by the courts of the State of Oklahoma is repugnant to the United States Constitution.

2. Whether any state by statute and statutory interpretation can deny any individual his rightfully obtained property.

3. Whether the elderly are a suspect class, bringing under strict scrutiny any state which by statute or statutory interpretation denies them equal protection of the law.

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No. _____

In the
Supreme Court of the United States
OCTOBER TERM, 1982

M. T. WARD, *Petitioner,*

v.

FAY FOWLER WARD

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Bruce Peterson and Georgina B. Landman, on behalf of M. T. Ward, petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Oklahoma through the Oklahoma Court of Appeals.

OPINIONS BELOW

Certiorari to review the opinion of the Oklahoma Court of Appeals was denied by the Oklahoma Supreme Court (App. A). The opinion of the Court of Appeals (App. B) was released as not for publication. The opinion of the trial court (App. C) is not reported.

JURISDICTION

The judgment of the Court of Appeals, State of Oklahoma (App. B), was entered on September 21, 1982. A petition and brief for rehearing (App. D) was timely filed on October 8th, 1982. Respondent, on October 28, 1982 was

directed to file a response before November 16, 1982 (App. E). On November 24, 1982 the Petition for rehearing was denied (App. F). A Petition for Certiorari to the Supreme Court of the State of Oklahoma was filed on December 10, 1982 (App. G). Certiorari was denied on January 12, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty or property, without due process of law . . .

2. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws.

3. Okla. Const. Art. 2 § 2 provides:

> All persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry.

4. Okla. Stat. Tit. 12 § 1278 (1981) provides in relevant part:

> DISPOSITION OF PROPERTY — RESTORATION OF WIFE'S MAIDEN NAME — ALIMONY — When a divorce is granted, the wife shall be restored to her maiden or former name if she so desires. *The*

Court shall enter its decree confirming in each spouse the property owned by him or her before marriage and the undisposed of property acquired after by him or her in his or her own right. Either spouse may be allowed such alimony out of real and personal property of the other as the Court shall think reasonable, having due regard to the value of the property at the time of the divorce. Alimony may be allowed from real or personal property, or both, or in the form of money judgment, payable either in gross or in installments, as the Court may deem just and equitable. As to such property, whether real or personal, which has been acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties, the Court shall make such division between the parties as may appear just and reasonable, by a division of the property in kind, or by setting the same apart to one of the parties, and requiring the other thereof to pay such sum as may be just and proper to effect a fair and just division thereof. The Court may set apart a portion of the separate estate of a spouse to the other spouse for the support of the children of the marriage where custody resides with the spouse. (Emphasis added)

STATEMENT

This case originated upon the filing of a Petition for Divorce by Fay Fowler Ward, in the District Court, Pawnee County, Oklahoma, asking for a division of the property acquired during the marriage of the parties, alimony, attorneys fees and costs. The case was tried on March 5th, 1981 with the decision announced and Divorce granted on March 20, 1981. Thereafter notice of appeal was properly, timely filed and perfected asking for reversal as to the property division.

However, this is not just the ordinary domestic relations case, but one which presents an ever important issue to millions of older, lonely Americans, whose hope is to find companionship in their later years and not be forgotten and discarded by an uncaring society during these remaining years of their lives.

In order to understand the circumstances of this action before you, and afford it proper consideration, it is imperative to keep in mind that the events, circumstances and happenings between the parties took place between a couple who were married later in life, this being the second marriage for each. When they married they each had grown children and Petitioner's intent was to work for a few more years and then retire with a woman who would be his companion for the rest of his life.

When Petitioner married he had over One Hundred Thousand Dollars ($100,000) — cash, a home and two ongoing businesses. He never even fathomed he would come to the end of his life without even a home of his own, with very little cash, and almost no means of support.

The Trial Court's opinion and that of the Court of Appeals and Supreme Court of the State of Oklahoma in their interpretation of Okla. Stat. Tit. 12 § 1278, flies in the face of justice, is repugnant to the United States Constitution and denies to a member of the class of elderly Americans equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution, by denying to Petitioner the enjoyment of the gains of his own industry.

Though Petitioner argued in his appeal to the Supreme Court of the State of Oklahoma (App. H, pp. 26-28) that

Oklahoma statutory interpretation and the line of cases following *Shackelton* v. *Gerard*, 385 P.2d 898 (Okla. 1963), and continuing through *Gist* v. *Gist*, 537 P.2d 460 (Okla. App. 1975), was unjust and should be modified, this issue was completely passed upon and not at all even addressed in the Appellate Court's Opinion (App. B). In ruling as it did, The Trial Court, the Court of Appeals and the Supreme Court of the State of Oklahoma instead chose to ignore this issue presented, just referring to Petitioner's Appeal as a squabble arising out of different property values (App. B, p. 2). In ignoring Petitioner's pleas they apparently chose to reaffirm *Gist* and its interpretation of Okla. Stat. Tit. 12 § 1278 where the court held:

> Where property is held in joint tenancy, each party is estopped from offering evidence to a separate contribution for the purchase of Joint Tenancy property without first showing fraud or special agreement between the parties wherein the nature of joint tenancy would be changed.

In other words, the court has ruled it irrelevant that an elderly individual who has worked and built toward his retirement all his life, with one swoop of the Judicial pen would find himself a pauper, since it must be presumed that he had made his second wife a gift of all his worldly possessions. Attitudes such as this erode the very foundation of trust and love which should be the main consideration in marriage, continue to denigrate the institution of marriage and take away from a whole strata of our society, our aged, their rightfully obtained gains of their own industry, denying them equal protection under the law. Perhaps, the best statement of the inequities heaped upon our aged can be found in the statement of Presiding Judge

Brightmire of the Oklahoma Court of Appeals in *Chapman* v. *Chapman*, 614 P.2d 90 (Okla. App. 1980), where he stated:

> In a real sense, then, one could conclude the man invested his life's savings in what he hoped would be a long term relationship — an investment that vanished when the woman filed for divorce. It seems to us the man is sufficiently penalized by having to forego any return on his investment — and even restoration of the investment itself. To exacerbate this inequality by imposing a substantial judgment on him is oppressive.

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning this country's aged, a state statute and statutory interpretation which has the effect of discriminating against them, and the denial by the State of Oklahoma to them of equal protection under the law as guaranteed to all Americans by the Fourteenth Amendment to the United States Constitution, by denying to them the enjoyment of the gains of their lifelong work and industry. As this Honorable Court stated in *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 572 (1972):

> Property interests, of course are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits . . .

Petitioner unequivocally agrees with this statement by Mr. Justice Stewart. However, Petitioner wishes to impress upon this Court that when this "independent source" has the effect of denying to any individual or group of individuals that which has been rightfully earned, that which they have a fundamental right to, then that "source" must be struck down as repugnant to the United States Constitution with the source being given the responsibility to make those individuals, or the individual harmed, whole again.

In *Harris* v. *Harris*, 606 P.2d 619 (Okla. App. 1980), the Oklahoma Court of Appeals restated the law in Oklahoma when it indicated:

> The amount of alimony and the particular division of property rests within the sound discretion of the Trial Court, to be exercised *in light of all surrounding circumstances*, and such alimony and property division will not be disturbed unless clearly against the weight of the evidence. (Emphasis added)

This being the case, the question must necessarily turn as to the meaning of "in light of the surrounding circumstances." In the case before you the question involves whether any State by Statute or Statutory interpretation, can deny to an individual who has struggled his entire life to build an estate, in order that he might some day retire and enjoy the fruits of his labor, and who then decided later in life to remarry, that property which he has rightfully earned, that property which was his prior to the newfound relationship. Petitioner thinks not and asks this Court to strike down as repugnant to the United States Constitution any statutory scheme which denies such an individ-

ual or a group of individuals their property right and equal protection under the law.

This Court has already indicated that the right to marry is of fundamental importance, *Loving* v. *Virginia*, 388 U.S. 1 (1967), and since the statutory interpretation of the State of Oklahoma infringes upon this right by placing a burden on those individuals choosing to marry later in life, this statute and statutory interpretation must be struck down. Though this Court has stated in *Massachussetts Board of Retirement* v. *Murgia*, 467 U.S. 307 (1976), that,

> Even if the statute could be said to impose a penalty upon a class defined as the aged, it would not impose a distinction sufficiently akin to those classifications that we have suspect to call for strict judicial scrutiny,

the statutory interpretation and the facts of the action before you go well beyond the age discrimination in employment issue in *Murgia* and to the institution of marriage and an individual's right to property. Surely individuals marrying later in life should not be penalized, losing the enjoyment of the gains of their lifelong work and industry.

This Court should not just state that age is not subject to a strict scrutiny analysis, for to do so would just do further injustice to a very vital part of our society. Perhaps the analysis of Mr. Justice Marshall dissenting in *Murgia* is appropriate:

> Of course the Court is quite right in suggesting that distinctions exist between the elderly and traditional suspect classes such as Negroes, and between the elderly and "Quasi suspect" classes such as women or

> illegitimates. The elderly are protected not only by certain anti-discrimination legislation, but by legislation that provides them with positive benefits not enjoyed by the public at large. Moreover, the elderly are not isolated in society, and discrimination against them is not pervasive but is centered primarily in employment. *The advantage of a flexible equal protection standard, however, is that it can readily accomodate such variables . . .*

Before you are such variables, legislation which both infringes upon the marital rights of older individuals and which denies to individuals the enjoyment of the gains of their lifelong work and industry. As Mr. Justice Stewart stated in *Lynch* v. *Household Finance Corporation, et al.*, 405 U.S. 538, 552 (1972):

> The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home or a savings account.

Okla. State. Tit. 12 § 1278 (1978) has taken away this fundamental right.

It may be argued that Petitioner has been given his day in court, his Due Process Rights as guaranteed by the Fifth Amendment, and thus has had his hearing before an impartial decisionmaker with adequate notice and an opportunity to be heard. However, this Court has long recognized, and continues to recognize, that this is not always the case. Mr. Chief Justice Vinson, delivering the opinion of the Court in *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), indicated:

> It has been recognized that the action of State Courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Ammendent, even though the judicial proceedings in such cases may have been in complete accord with the most rigourous conceptions of procedural due process.

Petitioner asks that you strike down this Statute and its interpretation by Oklahoma's courts and make right the wrong which has been committed.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted. The fundamental rights of marriage and of our aged to retain the fruits of their lifelong industry and toil are the issues before you. Statutes such as Okla. Stat. Tit. 12 § 1278 and its interpretation by the courts of the State of Oklahoma have perverted and will continue to pervert the institution of marriage by discouraging the remarriage of older individuals. It is doubtful that Petitioner will ever again seriously consider marrying. Loneliness is a sourge that is visiting millions of our aged, and statutory schemes so blantantly fostering such situations are repugnant to the

Constitution of the United States and must be struck down as constitutionally impermissible.

Respectfully submitted,

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April, 1983

APPENDIX A

[Filed January 12, 1983]

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Wednesday, January 12, 1983

THE CLERK IS DIRECTED TO ISSUE THE
FOLLOWING ORDERS:

* * *

56,636 Fay Fowler Ward v. M. T. Ward.
Certiorari denied.

* * *

(s) *Don Barnes*
CHIEF JUSTICE

APPENDIX B

NOT FOR PUBLICATION

[Filed September 21, 1982]

IN THE COURT OF APPEALS, DIVISION 2
STATE OF OKLAHOMA

FAY FOWLER WARD, Appellee,	)	
vs.	)	No. 56,636
M. T. WARD, Appellant.	)	

MEMORANDUM OPINION

BACON, J.

This appeal involves a divorce case wherein Husband is appealing the division of property.

The parties in this divorce case had both previously been married and had adult children. They married on June 2, 1966, and had no children of this marriage.

At the time the parties were married Husband was in the restaurant business and had an interest in two restaurants (which he sold during the marriage), a 160 acre farm, a new car, a new pickup and $10,000 cash. The record does not disclose what, if anything, Wife owned at time of marriage.

During the marriage the parties acquired another restaurant, bought and sold other real estate and gained items of personalty. At the time of divorce the property, real and personal, owned by the parties was debt free.

On September 23, 1980, Wife filed the present divorce action. She alleged extreme cruelty as grounds for the divorce. Husband cross-petitioned for divorce alleging incompatibility.

[APPENDIX]

On March 5, 1981, the case was tried. The trial court awarded both parties a divorce based upon incompatibility and made a property division. Husband is now appealing from the order of property division. We will treat all five of Husband's propositions of error as one because they all argue that the property division was inequitable and contrary to law and the evidence.

The trial court awarded the parties the following:

Wife	*Husband*
Home (41 acre tract — surface rights only)	Minerals under home (41 acre tract)
All household furniture and furnishings	Restaurant
1976 Cadillac automobile	1977 Dodge van
1972 Chevrolet pickup	1971 Pontiac
Promissory note on Ripley property	Checking account of restaurant
Cushing branch savings account	Personal checking account
Cushing rental house	Donut machine
Preferential school lease	Boat and motor
All cattle	75% of McBride promissory note
Rototiller	
Chain saw	
Drill Press	
Air compressor	
Mowers	
25% of McBride promissory note	
All personal effects	

As in all divorce cases the squabble in this case comes about because of different values placed upon the property by each party.

Wife valued the property awarded each party as follows:

Wife		*Husband*	
Home	$118,000	Minerals under home	?
Furniture	3,000	Restaurant	$225,000
Rent house	28,000	1977 Dodge	3,500
School lease	22,500	1971 Pontiac	2,000
Savings account	11,715	Business checking	9,736
Cattle	9,000	Donut machine	1,000
1972 Chevrolet	1,500	75% of McBride note	72,606
1976 Cadillac	4,000		$313,842
Ripley note	19,449		
Drill press, etc.	1,000		
Mowers	275		
25% of McBride note	24,202		
	$242,641		

Husband valued the property awarded each party as follows:

Wife		*Husband*	
Home	$156,125	Minerals under home	?
Rent house	16,604	Restaurant	$155,461
School lease	15,418	1977 Dodge	3,500
Savings account	11,715	1971 Pontiac	2,000
Cattle	9,000	Business checking	9,736
1972 Chevrolet	1,500	Boat and motor	200
1976 Cadillac	4,000	Donut machine	1,000
Furniture	5,000	75% of McBride note	72,606
Ripley note	19,449		$244,503
Drill press, etc.	1,000		
Mowers	275		
25% of McBride note	24,202		
	$264,288		

In reviewing the above valuations it appears that if Wife's valuations are used, Husband received some $70,000

more than Wife. If Husband's valuations are used, Wife received some $20,000 more than Husband.

The law in Oklahoma is clear that the division of property does not have to be equal but it must be just and equitable, whatever that is. *Durfee* v. *Durfee*, Okl., 465 P.2d 161 (1970). In the present case, using and assuming Husband's valuations are correct, the net difference between what Wife received and what Husband received is about $20,000. The record reveals that Wife did work at the restaurant and also worked on the houses and helped on the farm. Under these circumstances we cannot say that the $20,000 difference, using Husband's valuations, between what Wife received and what Husband received is unjust and inequitable. In this regard we further note that no valuation was placed upon the minerals under the home acreage which were awarded to Husband. It would seem undisputed that those minerals would have some value and that value would be added to Husband's total. We have, however, no way of knowing the value of the minerals as the record is silent on that point.

While it is true that Husband owned an interest in two restaurants, a 160 acre farm, a new pickup truck, a new car and had $10,000 cash when the parties married, the record is silent as to the value of the truck, car, and the 160 acre farm when it was sold. All of the property, real and personal, was held jointly by the parties. Further, there was no attempt at trial and only a minor attempt on appeal to urge that all real and personal property owned at time of trial was anything other than joint property acquired either by gift or otherwise. That is, the record lacks evidence upon which the trial court or this court could base any finding that all or any part of the real and personal property should not be considered joint property for the purpose of property division.

Affirmed.

BOYDSTON, P. J., and BRIGHTMORE, J., concur.

APPENDIX C

[Filed May 19, 1981]

IN THE DISTRICT COURT OF PAYNE COUNTY,
STATE OF OKLAHOMA

FAY FOWLER WARD,	)	
PLAINTIFF,	)	
	)	
VS.	)	NO. JFD-80-409
	)	
M. T. WARD,	)	
DEFENDANT.	)	

DECREE OF DIVORCE

NOW on this 5th day of March, 1981, this matter comes on to be heard before the Court upon the verified petition of the plaintiff for divorce, and upon the verified cross-petition of the defendant, at a time when said Court is in regular judicial session and pursuant to assignment. The plaintiff is present in person and by her attorney, James M. Springer, Jr., and the defendant is present in person and by his attorney, Georgina B. Landman, of the firm of Williams, Landman and Savage, of Tulsa, Oklahoma. The Court examines the files in said cause and finds that defendant has been personally served with summons and thereafter executed and filed his verified Answer and Cross-Petition herein, and that therefore said matter is ready to be heard. Thereupon, the plaintiff introduces his evidence and rests, and the defendant introduces his evidence and rests, and the Court, after having examined the pleadings herein filed, heard the evidence of the parties, and being fully advised in the premises finds that said matter should be continued until March 20, 1981, for consideration and decision.

NOW on this 20th day of March, 1981, this matter comes on to be heard before the Court for argument of counsel, and for rendering of decision by the Court. Both

parties are present in Court in person and with their respective counsel. Thereupon, the Court, after having heard argument of counsel and being fully advised in the premises finds that both parties should be granted an absolute decree of divorce, each from the other, upon the grounds of incompatibility. The Court further finds that no children have been born to said marriage and none conceived. The Court further finds that the plaintiff should have as her sole and separate property, the following described property, to-wit:

1. The surface and surface rights in and to Lots 3 and 4, otherwise described as the N/2 of NW/4 of Section 3, Township 17 North, Range 4 East of I.M., less and except a tract described as beginning at the SW/Corner of said N/2 NW/4 of Section 3, thence East 629.2 ft., thence No. 450 ft., thence West 629.2 ft., thence So. 450 ft., to point of beginning and further less and except a tract of land in the NW/4 of Section 3, Township 17 North, Range 2 East of I.M., Payne Co., Oklahoma, more particularly described as follows, to-wit: Beginning at a point 1317.2 ft. East and 60 ft. South of the NW/C of said NW/4, thence South 02°74'30" East 509.0 ft., thence South 78°54' East 189.6 feet to a point on the Westerly line of the Cushing Reservoir, thence North 14°03' East on said Westerly line 561.7 ft., to the point on the south right of way of Oklahoma Highway No. 33, thence West on said right of way line 347.2 feet to the point of beginning, and the oil, gas and other minerals in and to the West Half of said described real estate.
2. All of the household furniture and furnishings;
3. 1976 Cadillac automobile
4. The promissory note and mortgage and proceeds thereof, being known as the Ripley property, note executed by William Wagner and spouse.

5. The savings account in the Stillwater Savings and Loan Association Cushing Branch, #13-016323-6 in the approximate sum of $11,715.40;
6. Lots 45 and 46, Block 3, Stiles Addition to the City of Cushing, Payne County, Oklahoma, less and except the North 50 feet thereof;
7. The Preferential School Lease inclusive of all improvements, and rights and privileges thereunto belonging described as the E/2 NE/4 and the E/2 of the E/2 of W/2 of the NE/4 of Section 16, Township 16 North, Range 4 East of the I.M., Lincoln County, State of Oklahoma,
8. 1972 Chevrolet pickup,
9. All of the cattle
10. Rototiller
11. Chain saw
12. Drill press
13. Portable air compressor with gasoline motor
14. Riding mower and push mower
15. 25% of the annual payments of the promissory note dated December 4, 1972, in the original sum of $118,000.00, executed by Robert W. McBride and Roberta A. McBride, payable to the parties hereto and 25% of the 1980 payment already received by the defendant.
16. All of plaintiff's personal effects and belongings.

The Court further finds that the defendant should have as his sole and separate property the following described property, to-wit:

1. The West 5 feet of Lot Four (4), and all of Lots Five (5), Six (6), Seven (7) and eight (8), in Block Four (4), Highlands Addition to the City of

Cushing, Payne County, Oklahoma, including all of the improvements thereon and all of the personal property in the building known as "Snazy Bar-b-que", and

that defendant's title to the same should be quieted and confirmed in him;

2. 1977 Dodge Van
3. 1971 Pontiac
4. Checking account of the Snazy Bar-b-que Business as of the date of the filing of the Petition for divorce in the approximate sum of $9,736.53 at that time
5. The personal checking account as of the filing of the divorce in the approximate sum of $2,500.00
6. The donut machine and case
7. The flat bottom boat and Trolling motor
8. 3/4ths of the proceeds of the McBride note, including 3/4ths of the 1980 payment already received by the defendant
9. The oil, gas and other minerals and mineral rights in and to the East Half (E/2) of Lots 3 and 4, otherwise described as the N/2 of the NW/4 of Section 3, Township 17 North, Range 4 East of the Indian Meridian, less and except a tract described as beginning at the SW/Corner of said N/2 NW/4 of Section 3, thence East 629.2 feet, thence North 450 feet, thence West 629.2 feet, thence South 450 feet to the point of beginning and further less and except a tract of land in the NW/4 of Section 3, Township 17 North, Range 2 East of the Indian Meridan, Payne County, Oklahoma, more particularly described as follows, to-wit: Beginning at a point 1317.2 feet East and 60 feet South of the NW/C of said NW/4, thence South 02° 74′ 30″ East

509.0 ft., thence South 78° 54′ East 189.6 feet to a point on the Westerly line of the Cushing Reservoir, thence North 14° 03′ East on said Westerly line 561.7 feet to the point on the south right of way of Oklahoma Highway # 33, thence West on said right of way line 347.2 ft., to the point of beginning.

The Court further finds that each party should be forever barred and estopped from asserting or claiming any right, title or interest in the property set over to the other. The Court further finds that in the event the parties fail to execute Quit Claim Deeds to the real estate and mineral interest within ten days of the date hereof, then this Decree is to act as such a conveyance of the property set over to each party by this Decree. The Court further finds that the plaintiff should be restored to her former name of Fay Fowler. The Court further finds that each party should pay his or her own attorney's fee.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED BY THE COURT that the parties be, and they are, hereby granted an absolute decree of divorce, each from the other, upon the grounds of incompatibility; however, neither party may marry any other person for a period of six months from the date of this Decree of Divorce.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that the plaintiff have as her sole and separate property the following described property, to-wit:

1. The surface and surface rights in and to Lots 3 and 4, otherwise described as the N/2 of NW/4 of Section 3, Township 17 North, Range 4 East of I.M., less and except a tract described as beginning at the SW/Corner of said N/2 NW/4 of Section 3, thence East 629.2 ft., thence North 450 feet, thence West 629.2 feet, thence South 450 feet, to the point of beginning and further less and except a tract of

land in the NW/4 of Section 3, Township 17 North, Range 2 East of I.M., Payne Co., Oklahoma, more particularly described as follows, to-wit: Beginning at a point 1317.2 ft., East and 60 ft. South of the NW/C of said NW/4, thence South 02° 74' 30" East 509.0 ft., thence South 78° 54' East 189.6 feet to a point on the Westerly line of the Cushing Reservoir, thence North 14° 03' East on said Westerly line 561.7 ft., to the point on the south right of way of Oklahoma Highway No. 33, thence West on said right of way line 347.2 feet to the point of beginning, and the oil, gas and other minerals in and to the West Half of said described real estate.

2. All of the household furniture and furnishings;
3. 1976 Cadillac automobile
4. The promissory note and mortgage and proceeds thereof, being known as the Ripley property, note executed by William Wagner and spouse.
5. The savings account in the Stillwater Savings and Loan Association, Cushing Branch, # 13-016323-6 in the approximate sum of $11,715.40;
6. Lots 45 and 46, Block 3, Stiles Addition to the City of Cushing, Payne County, Oklahoma, less and except the North 50 feet thereof;
7. The Preferential School Lease inclusive of all improvements, and rights and privileges thereunto belonging described as the E/2 NE/4 and the E/2 of the E/2 of W/2 of the NE/4 of Section 16, Township 16 North, Range 4 East of the I.M., Lincoln County, State of Oklahoma,
8. 1972 Chevrolet pickup,
9. All of the cattle
10. Rototiller

11. Chain saw
12. Drill press
13. Portable air compressor with gasoline motor
14. Riding mower and push mower
15. 25% of the annual payments of the promissory note dated December 4, 1972, in the original sum of $118,000.00, executed by Robert W. McBride and Roberta A. McBride, payable to the parties hereto and 25% of the 1980 payment already received by the defendant.
16. All of plaintiff's personal effects and belongings.

and that plaintiff's title to the real estate should be quieted and confirmed in her.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that defendant have as his sole and separate property, the following described property, to-wit:

1. The West 5 feet of Lot Four (4), and all of Lots Five (5), Six (6), Seven (7), and eight (8), in Block Four (4), Highlands Addition to the City of Cushing, Payne County, Oklahoma, including all of the improvements thereon, and all of the personal property in the building known as "Snazy Bar-b-que", and

defendant's title to the same is hereby quieted and confirmed in him;

2. 1977 Dodge Van
3. 1971 Pontiac
4. Checking account of the Snazy Bar-b-que Business as of the date of the filing of the Petition for divorce in the approximate sum of $9,736.53 at that time

5. The personal checking account as of the filing of the divorce in the approximate sum of $2,500.00
6. The donut machine and case
7. The flat bottom boat and Trolling motor
8. 3/4ths of the proceeds of the McBride note, including 3/4ths of the 1980 payment already received by the defendant
9. The oil, gas and other minerals and mineral rights in and to the East Half (E/2) of Lots 3 and 4, otherwise described as the N/2 of the NW/4 of Section 3, Township 17 North, Range 4 East of I.M., less and except a tract described as beginning at the SW/Corner of said N/2 NW/4 of Section 3, thence East 629.2 feet, thence North 450 feet, thence West 629.2 feet, thence North 450 feet, thence West 629.2 feet, thence South 450 feet to the point of beginning and further less and except a tract of land in the NW/4 of Section 3, Township 17 North, Range 2 East of the Indian Meridan, Payne County, Oklahoma, more particularly described as follows, to-wit: Beginning at a point 1317.2 feet East and 60 feet South of the NW/C of said NW/4, thence South 02° 74′ 30″ East 509.0 ft., thence South 78° 54′ East 189.6 feet to a point on the Westerly line of the Cushing Reservoir, thence North 14° 03′ East on said Westerly line 561.7 feet to the point on the south right of way of Oklahoma Highway # 33, thence West on said right of way line 347.2 ft., to the point of beginning.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that each party is forever barred and estopped from asserting or claiming any right, title or interest in the property set over to the other.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that in the event the parties fail to execute Quit Claim Deeds to the real estate and mineral interests within ten days of the date hereof, then this decree is to act as such a conveyance of the property set over to each party by this Decree of Divorce.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that plaintiff be, and she is, hereby restored to her former name of Fay Fowler.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that each party pay his or her own attorney's fee.

(s) *Charles H. Headrick*
ASSOCIATE DISTRICT JUDGE

APPROVED AS TO FORM:
(s) *James M. Springer, Jr.*
ATTORNEY FOR PLAINTIFF

APPROVED AS TO FORM:
Williams, Landman and Savage
By: (s) *Georgina B. Landman*
ATTORNEYS FOR DEFENDANT

(s) *M. J. Ward,* DEFENDANT

(s) *Fay Fowler Ward,* PLAINTIFF

[Certification Seal omitted in printing]

APPENDIX D

[Filed October 8, 1982]

IN THE COURT OF APPEALS, DIVISION 2
STATE OF OKLAHOMA

FAY FOWLER WARD,	)	
Appellee,	)	
vs.	)	No. 56,636
	)	
M. T. WARD,	)	
Appellant.	)	

PETITION FOR REHEARING

COMES now M. T. WARD, the Appellant herein, by and through his attorney, GEORGINA B. LANDMAN, and respectfully represents to This Court that on the 21st day of September, 1982, a decision was rendered by this Court in the above entitled cause setting forth, among other things, that the Appellant was not entitled to relief in said cause, due to the fact that, "The law in Oklahoma is clear that the division of property does not have to be equal but it must be just and equitable, whatever that is. *Durfee* v. *Durfee*, Okl. 465 P2d 161, (1970)". Further, this Court found that, though there was no way of knowing the value of the minerals under the home acreage which were awarded to the Husband since the record was silent on that point, it would seem undisputed that those minerals would have some value. This Court also stated that since there was no attempt at trial and only a minor attempt on appeal to urge that all real and personal property owned at the time of trial was anything other than joint property acquired, either by gift or otherwise, that the property must be considered jointly for the purpose of property division. All in all, This Court arrived at its Opinion based upon the following statement: AS IN ALL DIVORCE CASES, THE SQUABBLE IN THIS CASE COMES ABOUT BECAUSE OF DIFFERENT VALUES PLACED UPON THE

PROPERTY BY EACH PARTY. It is respectfully submitted by the Appellant that in arriving at such a decision, This Honorable Court failed to consider certain points of law urged by the Appellant, which points are set forth in more particularity as follows:

1. This Court erred in basing their Opinion upon the premise that the squabble in this case came about because of the different values placed upon the property by each party.

2. That This Court erred in considering the mineral rights under the home acreage, stating that, "It would seem undisputed that these mineral rights would have some value and that value would be added to the Husband's total." When the record is silent on this point and any value placed upon these rights is purely speculative.

3. That This Court erred in stating that there was no attempt at trial and only a minor attempt on appeal to urge that all real and personal property owned at the time of trial was anything other than joint property, acquired either by gift or otherwise, when the testimony of both Appellant and Appellant's witnesses indicates on the Record and This Court themselves states in their Memorandum Opinion that the Appellant had considerable property upon entering into this second marriage and throughout Appellant's Brief, this issue is addressed.

WHEREFORE, premises considered, Appellant prays that a rehearing of said cause be had, and that upon rehearing, This Court grant the Appellant the relief prayed for in his original Petition in Error filed herein.

(s) *Georgina B. Landman*
GEORGINA B. LANDMAN
Attorney for Appellant

[Address and Certificate of Mailing omitted in printing]

[Filed October 8, 1982]

BRIEF IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING TO COURT OF APPEALS

This Appeal involved a divorce action wherein Appellant is appealing the division of property.

The parties in this action have both been previously married and had adult children. They were married on June 2nd, 1966, and had no children of this marriage.

At the time the parties were married, Appellant was in the restaurant business and had an interest in two (2) restaurants, which were subsequently sold during the marriage, a one hundred and sixty (160) acre farm, a new car, a pick-up and Ten Thousand Dollars ($10,000.00) cash.

During the marriage, the parties acquired another restaurant, bought and sold real estate, and acquired numerous items of personal property. At the time of the Decree of Divorce, the property, real and personal owned by the parties was free from debt.

On the 23rd day of September, 1980, Appellee filed the divorce action, alleging mental cruelty. Husband cross-petitioned for divorce, alleging incompatability. The case was tried on the 5th of March, 1981, where upon a divorce based upon incompatability and a property division was decreed by the Trial Court.

THEREAFTER, Notice of Appeal was properly, timely filed and perfected to the Supreme Court of the State of Oklahoma for reversal as to the division of property.

A Memorandum Opinion was issued by the Court of Appeals, Division 2, State of Oklahoma, on the 21st day of September, 1982, the Opinion in which Defendant now files his Petition for Rehearing to the Court of Appeals.

[APPENDIX]

ARGUMENTS AND AUTHORITIES

PROPOSITION I

THIS COURT ERRED IN BASING THEIR OPINION UPON THE PREMISE THAT THE SQUABBLE IN THIS CASE CAME ABOUT BECAUSE OF THE DIFFERENT VALUES PLACED UPON THE PROPERTY BY EACH PARTY.

In the MEMORANDUM OPINION This Court states, "As in all divorce cases, the squabble in this case comes about because of different values placed upon the property by each party. Appellant does not argue that different values were in fact placed upon the property by each party. However, this is not and should not be controlling in the decision arrived at. One need only to turn to Page 3 of BRIEF OF APPELLANT to determine that this is not, in fact, where the dispute arises. Appellant states:

> "In the spirit of justice, Appellant respectfully requests that his Appeal be considered in light of the facts that this was a second marriage for both parties, the standard of living of each before the marriage, the respective ages of the parties, and what each may have given up for the marriage, *what money or property each brought into the marriage* (emphasis added in Brief of Appellant), the physical and mental health of the parties and the relative ability, training and education of the parties. In that spirit a reversal of the Trial Court would be mandatory."

The issue before the Court then is not a difference in value placed upon the property by each party, but rather the money or property which each individual brought into this marriage and the equitable distribution of said property at the time of the Divorce Decree in light of this. As the Supreme Court of Oklahoma stated in *May* v. *May*, 596 P2d 536 (1979):

> "Purchase of home with Husband's separate funds, even though occurring after marriage, did not ipso

facto invest Wife with any greater interest in home than she would have had in purchase money if such money had remained intact in Husband's separate pre-marriage account."

PROPOSITION II

THAT THIS COURT ERRED IN CONSIDERING THE MINERAL RIGHTS UNDER THE HOME ACREAGE, STATING THAT, "IT WOULD SEEM UNDISPUTED THAT THESE MINERAL RIGHTS WOULD HAVE SOME VALUE AND THAT VALUE WOULD BE ADDED TO THE HUSBAND'S TOTAL." WHEN THE RECORD IS SILENT ON THIS POINT AND ANY VALUE PLACED UPON THESE RIGHTS IS PURELY SPECULATIVE.

In arriving at its Memorandum Opinion, This Court states:

"In this regard we further note that no valuation was placed upon the minerals under the home acreage which were awarded to Husband. It would seem undisputed that those minerals would have some value and the value would be added to Husband's total. We have, however, no way of knowing the value of the minerals as the Record is silent on this point."

This Court itself indicates that no valuation was placed upon the minerals. Further, This Court states that they have no way of knowing the value of said minerals. This Court then speculates that it is undisputed that these minerals have some value.

In rendering its Opinion, This Court must base its decision upon the evidence before it. Speculative inferences cannot be, and should not be, drawn in its determination as to a decision. The Supreme Court of the State of Oklahoma in *Spradlin* v. *American Travelers Ins. Co.*, 376 P2d 323 (1961) stated:

"In determining where the Trial Court erred in directing verdict for Plaintiff, Supreme Court on Ap-

peal would consider evidence introduced, whether than evidence offered and excluded or stricken."

Further, in *Chilton* v. *Chilton*, 252 P2d 121, 207 Okl. 647 (1953), the Court stated:

"An issue not determined in the Trial Court would not be decided in the Supreme Court on Appeal."

Though the facts of these cases are distinguishable with the case before you for review and the directions issued have been issued for the Trial Court, the fact remains that This Court has admitted that no valuation was placed upon point. Taking these two facts into consideration, This Court erred in even considering this issue.

PROPOSITION III

THAT THIS COURT ERRED IN STATING THAT THERE WAS NO ATTEMPT AT TRIAL AND ONLY THAN JOINT PROPERTY, ACQUIRED EITHER BY GIFT OR OTHERWISE, WHEN THE TESTIMONY OF BOTH APPELLANT AND APPELLANT'S WITNESSES INDICATES ON THE RECORD AND THIS COURT THEMSELVES STATES IN THEIR MEMORANDUM OPINION THAT THE APPELLANT HAD CONSIDERABLE PROPERTY UPON ENTERING INTO THIS SECOND MARRIAGE AND THROUGHOUT APPELLANT'S BRIEF, THIS ISSUE IS ADDRESSED.

This Court states that there was no attempt at trial and only a minor attempt on appeal to urge that all real and personal property owned at the time of trial was anything other than joint property acquired by gift or otherwise. The Record disputes this contention and, thus, the Opinion of This Court must be reversed.

One only has to return to Page 3 of Appellant's Brief and the following statement by Appellant.

"In the spirit of justice, Appellant respectfully requests that his Appeal be considered in light of the fact that

this was a second marriage for both parties, the standard of living of each before the marriage, the respective ages of the parties, what each may have given up for the marriage, *what money or property each brought into the marriage* (Emphasis added in Appellant's Brief), the physical and mental health of the parties, and the relative ability, training and education of the parties. In that spirit, reversal of the Trial Court would be mandatory."

Throughout Appellant's Brief, the facts have been put forth that consideration should have been made by the Trial Court that Appellant brought significant holdings into said second marriage, a fact verified in the Memorandum Opinion of This Court when This Court stated:

"At the time the parties were married, Husband was in the restaurant business and had an interest in two (2) restaurants (which he sold during the marriage), a one hundred and sixty acre (160) farm, a new car, a new pick-up, and Ten Thousand Dollars ($10,000.00) cash. The Record does not disclose what, if anything, Wife owned at time of marriage."

Further, Appellant testified to said property brought into the marriage as indicated on Page 8 of Appellant's Brief. Further, Appellant states in his Brief, quoting the Supreme Court of the State of Oklahoma in *Kirkland* v. *Kirkland*, 488 P2d 122 (1971).

"That where one spouse brings separate property to marriage, increased or enhanced value of the property will not constitute jointly acquired property during coverture unless the enhancement value was a result of joint efforts, skills, or funds of both spouses."

Furthermore, as the Court stated in *Turlington* v. *Turlington*, 144 P2d 947 (1944), and which is stated at Page 17 of Appellant's Brief:

"What constitutes an equitable division of jointly acquired property is to be determined from the circum-

stances surrounding the acquisition of property, the conduct of the parties with relation thereto, and in making such determination at why discretion is vested in the Trial Court.

Appellant, on Page 18, states that:

"Even though a Trial Court has wide discretion, this Appellant feels the Trial Court did not take into consideration the various testimony of himself, his witness or even the Appellee, herself, in determining how the acquisition of the property was brought about and the labor of Appellant expended in creating his estate."

The fact remains that these attempts by Appellant to urge that consideration should be given to the property as acquired by him prior to said marriage was by no means a minor point and was consistently urged during Trial and in Appellant's Appeal.

It should also be noted that besides the testimony of Appellant, himself, at Trial to this issue, all of the testimony of Appellant's witnesses, RAYMOND LEE BLAYLOCK (Transcript Page 34), and PHILIP WYATT WARD (Transcript Page 38), involved the fact that Appellant had brought into this second marriage a large amount of property. Appellant's only reason for this testimony and for much of Appellant's own testimony was to indicate to the Trial Court that this should be taken into consideration in the distribution of property, a fact which neither the Trial Court nor This Court has done.

Appellant urges that this is a proper consideration and that the decision of the Supreme Court of the State of Oklahoma in *May* v. *May*, 596 P.2d 536 (1979), whereby the Court stated:

"Purchase of a home with Husband's separate funds, even though occurring after marriage, did not ipso facto invest Wife with any greater interest in home

> than she would have had in purchase money if such money had remained intact in Husband's separate premarriage account."

should be controlling.

CONCLUSION

Based on the foregoing authorities and argument, the Appellant submits that the Memorandum Opinion decision issued by the Court of Appeals on the 21st day of September, 1982, should be reversed, that the decision of the District Court of Payne County, issued on the 21st day of March, 1981, insofar as it governs the property division of the parties should also be reversed and set aside and held for naught, or in the alternative, that this action should be remanded to the Trial Court for a new trial and for such other and further relief as this Honorable Court may deem just and fair.

Respectfully Submitted,

(s) *Georgina B. Landman*
Attorney for Appellant

[Address and Certificate of Mailing omitted in printing]

[Filed October 8, 1982]

MOTION FOR PETITION TO MAKE ORAL ARGUMENT

COMES now the Appellant, above named, and moves this Court for an Order allowing said Appellant to appear before this Honorable Court and present oral argument in support of his Petition for Rehearing filed herein.

(s) *Georgina B. Landman*
Attorney for Appellant

[Address and Certificate of Mailing omitted in printing]

APPENDIX E

[Filed October 28, 1982]

IN THE COURT OF APPEALS, DIVISION 2
STATE OF OKLAHOMA

Wednesday, October 27, 1982

THE CLERK IS DIRECTED TO NOTIFY ALL PARTIES OF THE FOLLOWING ORDERS:

* * *

56,636 FAY FOWLER WARD, Appellee, vs.
M. T. WARD, Appellant.

Appellee is directed to file a response to Appellant's Petition for Rehearing on or before November 16, 1982.

* * *

(s) *John D. Boydston*
JOHN D. BOYDSTON

PRESIDING JUDGE
COURT OF APPEALS, DIVISION 2

APPENDIX F

[Filed November 24, 1982]

IN THE COURT OF APPEALS, DIVISION 2
STATE OF OKLAHOMA

Tuesday, November 23, 1982

THE CLERK IS DIRECTED TO NOTIFY ALL PARTIES OF THE FOLLOWING ORDERS:

* * *

56,636 FAY FOWLER WARD, Appellee, vs. M. T. WARD, Appellant.

Both the Petition for Rehearing and Motion for Oral Argument of Appellant are denied.

* * *

(s) *John D. Boydston*
JOHN D. BOYDSTON
PRESIDING JUDGE
COURT OF APPEALS, DIVISION 2

APPENDIX G

[Filed December 10, 1982]

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

FAY FOWLER WARD,	)	
Appellee,	)	
vs.	)	No. 56,636
	)	
M. T. WARD,	)	
Appellant.	)	

PETITION FOR CERTIORARI

COMES NOW the Appellant herein, M. T. WARD, by and through his attorney, GEORGINA B. LANDMAN, and for his Petition seeking Certiorari to review the decision of the Court of Appeals, Division No. 2, in the captioned cause, states:

1. The opinion of the Court of Appeals, Division No. 2, in the captioned cause was not released for publication in the official reporter.

2. The Memorandum Opinion of the Court of Appeals, Division No. 2, was issued on the 21st day of September, 1982.

3. That a Petition for Rehearing and Brief in Support along with a Motion for Oral Argument was timely filed on the 8th day of Ocotber, 1982.

4. That Appellee was directed to file a response on or before the 16th day of November, 1982.

5. That on the 24th day of November, 1982, the Court of Appeals, Division No. 2, filed an Order denying both Appellants Petition for Rehearing and Motion for Oral Argument without explanation.

6. Appellant seeks review of said Opinion in the Supreme Court of Oklahoma on a Writ of Certiorari for the following reason:

[APPENDIX]

That the Court of Appeals in this case has decided a question of substance reaching an incorrect result by the misapplication and misinterpretation of the settled decisions of this Court.

7. A concise statement of the facts containing the matters material to the consideration of the question herein presented is as follows:

This Appeal involves a divorce action wherein Appellant is appealing the division of property.

The parties were married on June 2nd, 1966, a childless marriage, though both had been married previously and had adult children.

At the time the parties were married, Appellant was in the restaurant business and had an interest in two (2) restaurants, which were subsequently sold during the marriage, and a One Hundred and Sixty (160) acre farm, a new car, a pick-up truck, and Ten Thousand Dollars, ($10,000.00) cash.

During the marriage, the parties acquired another restaurant, bought and sold real estate, and acquired numerous items of personal property. At the time of the Decree of Divorce, the property, real and personal owned by the parties was free from debt.

On the 23rd day of September, 1980, Appellee filed the divorce action, alleging mental cruelty. Appellant then cross-petitioned alleging incompatibility. The case was tried on the 5th of March, 1981, whereupon a divorce on the grounds of incompatibility, and a property division was entered by the Trial Court.

In *May* vs. *May* 596 P. 2d 536 (1979) this Honorable Court stated:

> The property in controversy was acquired with husband's separate funds. Its purchase, though after the marriage in point of time, did not ipso facto invest

the wife with any greater interest in that property than she would have had in the money (before it was spent for this purpose) if that money had remained intact in husband's separate pre-marriage account.

Further this Honorable Court indicated in *Kirkland* vs. *Kirkland*, 488 P. 2d (1971), that:

> Where one spouse brings separate property to the marriage, increased or enhanced value of the property will not constitute jointly acquired property during coverture unless the enhanced value was the result of joint efforts, skill or funds of both spouses.

Furthermore, the Court of Appeals itself has stated in *Hutto* vs. *Hutto*, 602 P. 2d 1055 (Okla. App. 1979) that:

> . . . for the increased value of the business to be properly considered as part of the joint marital estate she was obliged to prove (1) that the net worth of the business increased during the marriage, and (2) such increase resulted in substantial part from her efforts.

In arriving at its decision in this case the Court of Appeals has chosen to ignore the settled decisions of both this Honorable Court and the Court of Appeals itself. Page One of its Memorandum Opinion lists the numerous assets which the Appellant brought into the marriage. It also notes that "the record does not disclose what, if anything, wife owned at time of marriage." This statement is in error as the wife admitted at the trial that she had nothing at the inception of the marriage. Yet notwithstanding these facts, and regardless of the Court's error, the Court still decided that the "squabble in this case comes about because of different values placed upon the property by each party" and ignores totally the crux of Appellant's whole appeal that:

> In the spirit of Justice, Appellant respectfully requests that his Appeal be considered in light of the fact that this was a second marriage for both parties,

> the standard of living of each before the marriage, what each may have given up for the marriage, *what money or property each brought into the marriage*, the physical and mental health of the parties, and relative ability, training, and education of the parties. In that spirit, reversal of the Trial Court would be mandatory. (Emphasis added P. 3 of Appellants Brief.)

This Honorable Court stated in *Chilton* vs. *Chilton*, 252 P. 2d 207 Okla. 647 (1953) that:

> An issue not determined in the Trial Court would not be decided in the Supreme Court on Appeal.

Though the Court of Appeals was in error in their stating the record is silent on those assets brought into the marriage by the wife, the Court has stated and based its opinion on this fact of the records being silent on the issue. This is even more reason why the decision of the Court is in error, since even if the record was silent on the issue of the Appellee's pre-marital assets, the fact remains that they chose to decide this action while completely ignoring those facts which they admit are on the record, facts which could only lead to a reversal of the decision of the Trial Court and by doing this have also ignored the settled decisions of this Honorable Court.

As was stated in *Chapman* vs. *Chapman*, 614 P. 2d 90 (Okla. App. 19 0):

> In a real sense, then one could conclude the man invested his life's savings in what he hopes would be a long term relationship — an investment that vanished when the woman filed for divorce. It seems to us, the man is sufficiently penalyzed by having to forego any return on his investment — and even restoration of the investment itself. To exacerbate this inequality by imposing a substantial judgment on him is oppressive.

The fact remains that the issue before the Court of Appeals was the value of the money and property which

each individual brought into the marriage and the equitable division of the said property at the time of the Decree of Divorce in light of this. In view of the record with regards to those assets brought into the marriage, and in view of the settled decisions of this Honorable Court and the Court of Appeals, themselves, the only ruling possible is a reversal of the decision insofar as it governs the property division of the parties issued on the 21st day of March, 1981, in the District Court of Payne County.

WHEREFORE, Appellant requests that this Court grant his Petition for Certiorari, vacate the decisions of the Court of Appeals and the Trial Court and grant Appellant the relief prayed for in his original Petition in Error filed herein.

Respectfully submitted,

(s) *Georgina B. Landman*
GEORGINA B. LANDMAN

[Address and Certificate of Mailing omitted in printing]

[Attached to this Instrument was the Opinion of the Oklahoma Court of Appeals appearing as Appendix B to this Petition for Writ of Certiorari.]

APPENDIX H

BRIEF OF APPELLANT
Pages 26, 27, and 28

[Filed December 18, 1981]

NO. 56636

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

FAY FOWLER WARD,
Appellee,

vs.

M. T. WARD,
Appellant.

* * *

PROPOSITION V: THE LINE OF CASES FOLLOWING THE RATIONALE OF *GIST* v. *GIST*, 537 P.2d 460 (Okla. App. 1975) IS UNJUST, UNFAIR CONCERNING SECOND MARRIAGES "LATE IN LIFE" AND SHOULD BE MODIFIED.

The Court in *Gist, supra,* held: [13]

Where property is held in joint tenancy, each party is estopped from offering evidence to a separate contribution for the purchase of joint tenancy property

[13] *Gist* v. *Gist*, 537 P.2d 460 (Okl. App. 1975). *Gist* does not give any indication, by the opinion or transcript if this was first or second marriage of parties. However *Gist* has "character" of a first marriage, because of duration of 22 year marriage, minor children and omission of testimony relating to any previous marriage. This case is distinguished from Appellant and Appellee's situation as the Court in *Gist* was mainly concerned with the wife's alimony. *Ward* v. *Ward* is concerned only with inequitable property division.

without first showing fraud or special agreement between the parties wherein nature of joint tenancy would be changed.

Gist, supra, re-affirms the decision in *Shackelton* v. *Sherrard,* 385 P.2d 898 (1963):[14]

"Ordinarily, notwithstanding the wife pays all of the consideration, a gift to the husband results if the wife consents to the conveyance being made to herself and husband."

These lines of thoughts were undoubtedly adopted from tax law theory where when evaluating a person's estate, only one-half of the value goes into the deceased spouse's estate, presuming a gift to the other spouse when property is held in joint tenancy. This was adopted so that the Internal Revenue could not be bypassed upon the death of one spouse to jointly held property. However, should the rationale of the Internal Revenue rules extend into the domestic relations area? This Appellant thinks not. A person who has worked and built toward his retirement all his life should not find himself a pauper after a divorce merely because the Court presumes he made a gift to his second wife of all his worldly goods. Indeed, if persons could read the crystal ball and forsee a divorce, they would never place their assets into jointly held properties.

If rules as set out in *Gist, supra,* and *Shackelton, supra,* are to continually take away from the spouse that made the jointly-held property possible it is foreseeable that more and more caution will be taking place between spouses. Attitudes such as this tend to erode the very foundation of trust and love that should be the main considerations of marriage.

---

[14] *Shackelton* v. *Sherrard,* 385 P.2d 898 (1963). These parties were never legally married. They held property as joint tenants. Husband quit claimed to his son and daughter-in-law his share of the property, thereby making "wife" and son and daughter-in-law tenants in common.

Appellant contends that since he never filed a federal gift tax return that he never intended to present Appellee with a gift of one-half his separate property and funds he brought into the marriage, although those properties and funds have now been exchanged for other property and funds.

Gist, supra, was based upon concept of "fault" where husband forced the wife to file for divorce. Oklahoma has long abolished concepts of fault in a marital relationship and punishing the party at fault. This is clearly distinguishable from the case at bar where the parties were merely guilty of incompatibility.

The Courts have established hard and fast rules when it comes to "first" marriages. (And that is the way it should be) emphasis added. However applying these rules to "second" marriages does not always end up the most equitable solution to the dissolution of the marriage.

Gist, supra, also stood for the proposition that wife portion should not be dominated by husband's property. This is clearly distinguishable from the case at bar where Mr. Ward is left without even one of the three residences in which to live.

* * *

Respectfully submitted,

(s) *Georgina B. Landman*
GEORGINA B. LANDMAN
Attorney for Appellant

[Address and Certificate of Mailing omitted in printing]